

ISSUE DATE: January 8, 2001

DOCKET NO. P-421/AM-00-1165

**ORDER REQUIRING FURTHER PROCEEDINGS AND DESIGNATING LEAD
COMMISSIONER**

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

**Gregory Scott
Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayner**

**Chair
Commissioner
Commissioner
Commissioner
Commissioner**

**In the Matter of Qwest Corporation's
Refiling of its Proposed Tariffs Regarding
Termination Liability Assessments as
Applied to Resale Arrangements**

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PROCEDURAL HISTORY

On May 21, 1998 the Commission issued an Order construing certain tariffs of Qwest Corporation (then U S WEST Communications, Inc.). The Order found that contract termination charges, described in the tariffs as termination liability assessments (TLAs), did not apply when customers substituted a reseller for Qwest as the provider of services in extended term contracts.¹ The Company appealed this decision to the Minnesota Court of Appeals.

On June 1, 1998 the Company filed new tariff and price list revisions explicitly imposing TLAs on customers substituting a reseller for Qwest as the provider of contract services. On October 13, 1998 the Commission issued an Order rejecting the new TLAs and staying the implementation of any future TLAs until they had been approved by the Commission.² The Company appealed this decision, too, to the Minnesota Court of Appeals.

¹ **In the Matter of a Complaint by InfoTel Communications, LLC v. U S WEST Communications, Inc. Concerning Resale of Contract Services, Docket No. P- 421/C-98-10, ORDER CONSTRUING TARIFFS AND PROHIBITING TERMINATION CHARGES IN RESALE CONTEXT (May 21, 1998).**

² **In the Matter of U S WEST Communications, Inc.'s Proposed Revisions to Termination Liability Assessments, Docket No. P-421/EM-98-769, ORDER REJECTING TARIFF/PRICE LIST REVISIONS, CLARIFYING PRACTICAL EFFECT OF FILING, AND STAYING IMPLEMENTATION OF FUTURE TARIFF/PRICE LIST REVISIONS (October 13, 1998).**

On May 4, 1999 the Minnesota Court of Appeals reversed and remanded the Commission's decision in the first case. The Court found that the tariff language construed by the Commission was ambiguous. Since the Commission reasonably determined that the purpose of the tariff provision was recovery of the Company's costs, the Court required specific findings on the costs avoided and incurred when contract customers switched to resellers during the contract term.

On June 10, 1999 Qwest and the Commission entered into a stipulation under which the Company agreed to (1) file another tariff on the application of TLAs in resale situations, different from the one under appeal in the second case; and (2) dismiss its appeal in the second case.

The Commission agreed to (1) act on the new filing by conducting an expedited proceeding under Minn. Stat. § 237.61, unless a different kind of proceeding was required by law; and (2) either delegate the filing to a Commission subcommittee under Minn. Stat. § 216A.03, subd. 8 or designate a lead Commissioner for the filing under Minn. Stat. § 216A.03, subd. 9.

On August 17, 2000 Qwest filed its new proposed tariff. That tariff would impose a TLA of 17.66% of the monthly rate for contract services for each month the customer did not take service directly from Qwest during the first year of the contract. The TLA would drop to 9% per month for subsequent contract years. These TLAs, which are significantly lower than those assessed when a customer stops taking contract services entirely, would apply only if the reseller agreed to buy the contract services at wholesale from Qwest for the remainder of the contract term.

The following persons filed comments on the proposed tariff: the Minnesota Department of Commerce; the Residential and Small Business Utilities Division of the Office of the Attorney General; Eschelon Telecom of Minnesota, Inc.; McLeodUSA Telecommunications Services, Inc.; EN-TEL Communications, LLC, Lakedale Link, Inc., WH Link, LLC, and Direct Communications, LLC, filing jointly; the Association of Communications Enterprises (ASCENT), formerly the Telecommunications Resellers Association; USLink, Inc.; and Firstcom, Inc.

On November 8, 2000 Qwest filed reply comments.

On December 19, 2000 the filing came before the Commission.

FINDINGS AND CONCLUSIONS

I. Positions of the Parties

A. The Company

Qwest filed its proposed tariff, a memorandum supporting approval of its proposed tariff, and an affidavit from its Director of Cost Accounting, D. M. (Marti) Gude, explaining the factual basis for the proposed tariff. Ms. Gude stated that in her judgment the Company was left with incurred, unavoids, and unrecovered costs of 12.7% when customers

substituted resellers for Qwest in extended term contracts for specialized services.

The Company contended that it was reasonable and legally permissible for it to impose TLAs to recover sunk costs from the customers on whose behalf they were incurred. It explained that it had chosen a higher TLA for the first twelve months of a contract term to discourage early terminations, but that the average of all TLAs imposed would not exceed the 12.7% figure set by Ms. Gude. The Company argued that it must have an agreement from the reseller to complete the contract term, because its cost calculations were based on the assumption that it would receive wholesale revenues for the contract services until the end of the contract.

B. The Government Agencies

The Department of Commerce (the Department) argued that imposing a TLA when a contract customer switches to a reseller violates the prohibitions against unreasonable or discriminatory conditions or limitations on resale under the federal Telecommunications Act of 1996³ and the Minnesota Telecommunications Act.⁴ In the alternative, the Department argued that the Company had not proved that in these situations it had unavoided costs of 12.7%.

The Residential and Small Business Utilities Division of the Office of the Attorney General (RUD) opposed the Company's proposal on two grounds: (1) the Company had failed to prove that the proposed TLAs would not over-recover its costs; and (2) the Company had failed to prove a compelling cost justification for charging higher TLAs to customers who switch to resellers during the first year of their contracts, suggesting unreasonable discrimination against this group of customers.

C. The Competitive Local Exchange Carriers

All the competitive local exchange carriers (CLECs) who intervened or commented in this case opposed the TLAs proposed by the Company, arguing that they would function as barriers to competition, would hamper the unrestricted resale of the incumbent's services contemplated under state and federal statutes, and would over-recover Qwest's costs.

They emphasized that reselling specialized services under long-term contracts was a prime market entry strategy for new competitors. They argued that competition might never gain a foothold, let alone thrive, if Qwest were permitted to use excessive TLAs to "lock up" the lucrative long-term specialized services market before competitors could enter.

Some CLECs argued that TLAs in any amount were unreasonable at this stage in the transition to a competitive market. Others conceded that TLAs substantially lower than those proposed by the Company might be acceptable. All CLECs challenged Qwest's claim that it had stranded costs of 12.7% of total contract revenues when customers switched to

³ 47 U.S.C. § 251(c)(4).

⁴ Minn. Stat. § 237.121.

resellers.

Eschelon argued that the TLAs proposed by the Company were so excessive compared to what the Company actually lost that they might well be invalid as penalties or as unconscionable terms under Minnesota contract law.

ASCENT expressed concern that a reseller whose customer was “won back” by Qwest might still be liable under the tariff for wholesale charges for the remainder of the contract term.

Finally, all CLECs agreed that Qwest had not produced evidence demonstrating stranded costs in the amounts claimed. They pointed out, among other things, that the Company’s base figures did not appear to be service-specific and that it appeared that certain sales commissions that were recouped from employees were still included as stranded costs.

II. Commission Action

A. Evidentiary Proceedings Required

It is clear that several issues raised by the parties cannot be resolved on this record. Those issues include at least the following:

- (a) the amount of Qwest’s unavowed costs when a retail customer taking service under a long term contract switches to a reseller buying wholesale service from Qwest;**
- (b) the reasonableness and likely consequences of the proposed tariff provision making resellers liable for the wholesale rate for the remainder of a customer’s contract term, whether the customer completes the contract term or not;**
- (c) whether the TLAs proposed by Qwest constitute unreasonable restrictions on resale;**
- (d) whether all Qwest TLAs in a resale setting should be prohibited as anti-competitive, as unreasonable restrictions on resale, as contrary to public policy, or on any other grounds, and if so, whether this prohibition should be temporary or permanent.**

The Commission will conduct evidentiary proceedings on these and any related relevant issues.

B. Procedural Framework

In its stipulation with Qwest, the Commission agreed to conduct an expedited proceeding on this filing, unless an alternative proceeding was mandated by law. The Commission also agreed to exercise its authority under Minn. Stat. § 216A.03 and either designate a lead Commissioner to review the filing or delegate review of the filing to a Commission subcommittee. The briefing materials prepared by Commission staff and served on all

parties recited these agreements and listed both subcommittee delegation and lead Commissioner appointment as procedural options to be considered at the December 19 meeting.

At the December 19 meeting the Commission sought comments from the parties on a proposal to designate Chair Gregory Scott lead Commissioner for this docket, authorizing him to exercise the Commission's authority to develop the evidentiary record, including holding hearings and requesting written or oral comments. There were no objections.

Having reviewed the record and having heard the comments of the parties, the Commission will proceed with that designation. The Commission believes that the designation will both comply with the stipulation and ensure the full, fair, prompt, and efficient development of the record. The Commission will so order.

ORDER

1. The Commission will conduct further proceedings on the issues set forth above.
2. The Commission hereby designates Chair Gregory Scott to serve as lead Commissioner for this docket under Minn. Stat. § 216A.03, subd. 9.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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